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FEDERAL COMMUNICATIONS COMMISSION
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ORIGINAL

August 18, 2003

BY HAND

Marlene H Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re Notice of Ex Parte Presentation in MB Docket 03-124

Dear Secretary Dortch:

On August 15, 2003, Bruce D Sokler, Bertram W. Carp and the undersigned, representing Advance Newhouse, Cable One, Cox Communications, and Insight Communications ("Joint Cable Commenters") met with Barbara Esbin and Tracy Waldon of the Media Bureau, JoAnn Lucanik of the International Bureau, Donald Stockdale of the Office of Strategic Planning, and James Bird of the Office of General Counsel to discuss issues raised in the Comments, Reply Comments, and August 4 *ex parte* filing of the Joint Cable Commenters in the above-referenced proceeding, as well as potential remedies to the competitive harms identified in those submissions

As the Joint Cable Commenters have explained in previous submissions to the Commission, control of the DirecTV distribution platform effectively reduces the costs and risks to News Corp of employing "take it or leave it to DirecTV" bargaining tactics with competing MVPDs seeking to carry "must have" FOX broadcast network and regional sports network ("RSN") programming

By lowering the costs and risks of service interruptions for News Corp., the transaction harms competition and consumer welfare by affording News Corp undue pricing power that will yield higher cable rates and/or increase the likelihood of service interruptions for customers served by MVPDs that attempt to resist supra-competitive prices sought for News Corp.'s broadcast network and RSN programming

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To avert this result, the Joint Commenters offered the transaction-specific conditions set forth in the attachment to this letter, which are aimed at constraining the undue pricing power and bargaining leverage accorded to News Corp by this transaction by mitigating its ability to utilize DirecTV as a "tactical weapon" during program carriage negotiations with unaffiliated MVPDs Copies of the appended handout were distributed to the attendees.

Pursuant to sections 1 1206(b) of the Commission's rules, the original and two copies of this letter and the appended handout are being filed with the Office of the Secretary. Copies are also being served on the Commission participants in the meeting Any questions concerning this submission should be addressed to the undersigned.

Sincerely,

Christopher J Harvie

Enclosure

cc	JoAnn Lucanik	(via email)
	Barbara Esbin	(via email)
	Tracy Waldon	(via email)
	Donald Stockdale	
	James Bird	(via email)

The Commission Should Impose Additional Conditions on the News Corp./DirecTV Merger to Reduce the Transaction's Likely Effect of Increasing the Frequency of Service Interruptions and Raising Programming Costs for Consumers

Background

- Control of the DirecTV distribution platform effectively reduces the costs and risks to News Corp of employing "take it or leave it" bargaining tactics with competing MVPDs seeking to carry "must have" FOX broadcast network and regional sports network ("RSN") programming.

- While News Corp. has proposed commitments that set forth regulatory, non-discriminatory restraints on its carriage agreements with MVPDs for News Corp. cable services, those commitments will not deter it from using DirecTV as a "battering ram" or "tactical weapon" for imposing higher programming costs and additional, costly services on cable operators seeking to distribute its "must have" Fox broadcast network and regional sports programming.

- With the Fox cable and broadcast services and the DirecTV distribution platform under the same corporate banner, News Corp. can coordinate these formidable content and distribution assets to maximize its leverage during program carriage disputes with cable operators. Further, once News Corp. controls DirecTV, it will pocket additional revenues gained from subscribers migrating to the DirecTV platform in order to retain access to the disputed programming

- Thus, the takeover substantially reduces the pre-transaction risks to News Corp. of failing to conclude a carriage agreement with a cable operator for a "must have" Fox programming service. By lowering the costs and risks of such disputes for News Corp., the transaction increases the likelihood of higher programming costs and/or more frequent service interruptions.

- By placing cable operators in the position of either acquiescing to higher programming fees for "must have" Fox network and RSN content, or ceding such content to its chief rival, the transaction creates a structural circumstances in which an adverse impact on consumer welfare – in the form of higher prices or reduced output – is inevitable.

- To avert this result, the Commission must adopt targeted, transaction-specific conditions which constrain the undue pricing power accorded to News Corp. by this transaction by diminishing the merged entity's ability to use DirecTV as a "battering ram" and "tactical weapon."

News Corp. Should Be Precluded From Using DirecTV to Force Cable Operators to Choose Between Providing High-Cost Regional Sports Networks to All Their Subscribers – or None At All

- Fox controls a dozen regional sports networks (RSNs) that own the television rights to games played by more than one-half the country's professional baseball, basketball and hockey teams.

- The FCC has characterized regional sports programming as "must-have" content, due to the intense local interest in professional sports.

- Fox RSNs also are among the most expensive programming carried by cable operators and News Corp. typically insists that such programming be carried on an operator's most popular tier of service, thereby putting upward pressure on cable rates for all subscribers

- While RSNs are of strong interest to an important and vocal segment of an MVPD's subscriber base, some subscribers may not be interested in paying higher rates for sports programming. Nevertheless, MVPDs cannot remain competitively viable unless they can offer RSNs to their subscribers.

- Acquiring DirecTV provides News Corp. with greater incentive and ability to impose higher prices across the board by forcing cable operators to choose between raising rates to all subscribers in order to retain access to Fox RSNs, or ceding that critical content to their most formidable competitor, DirecTV.

- The proposed RSN condition adopts the anti-tying provision from the FTC's *Turner-Time Warner* consent decree

- The proposed RSN condition also would require News Corp., before requiring the removal of a RSN, to offer more flexibility regarding tiering and penetration requirements for carriage of RSNs, so that operators can make an RSN available to their subscribers on either (i) a "mini-tier" or (ii) an a la carte basis.

- The proposed condition would mitigate the upward pressure on cable rates associated with combining News Corp.'s dominance in the RSN marketplace with the DirecTV platform by providing consumers with more choice and control in deciding whether to pay for high-cost RSNs.

- In any complaint under this provision, News Corp. would have the burden to demonstrate that the "mini-tier" and a la carte offers provided the MPVD a "genuine choice" as to how to carry the RSN both in terms of price and conditions. The "genuine choice" standard has been used in other content licensing markets to ensure that content providers with market power do not adversely affect price and output by unduly constraining the manner in which their content is made available to prospective licensees.

- The proposed condition would not preclude operators and News Corp. from agreeing to carry an RSNs in the operator's most popular service tier, and – by reducing News Corp.'s ability to engage in "take it or leave it to DirecTV" bargaining – diminishes News Corp's ability to extract a supra-competitive price for carriage in that tier.

- By limiting News Corp's ability to use the combined leverage of DirecTV and its popular RSNs to raise rates to all subscribers, the proposed condition will enhance consumer welfare and provide some constraint against the upward pressure on cable rates fostered by the transaction.

Regional Sports Network Condition

Tying

1. News Corp. shall not, expressly or impliedly:
   (a) refuse to make available or condition the availability of a Regional Sports Network it controls (News Corp. RSN(s)) to any MVPD on whether that MVPD or any other MVPD agrees to carry any other News Corp. owned, controlled, or affiliated video programming service or television broadcast station; or
   (b) condition any carriage terms for a News Corp. RSN to any MVPD on whether that MVPD or any other MVPD agrees to carry any other News Corp. owned, controlled or affiliated video programming service or television broadcast station.

Tiering

2. News Corp. may offer a license agreement for an News Corp. RSN with fees, terms and conditions based upon an MVPD's transmission or distribution of such News Corp. RSN in such MVPD's most popular tier of service. However, prior to taking any action to deauthorize or cause the removal of an News Corp. RSN from any MVPD's package of video programming services offered to any of its subscribers,, News Corp. shall also, upon request by any MVPD, make a good-faith offer that enables such MVPD to carry, and pay license fees for, such News Corp. RSN based upon

   (a) distribution in an existing or a proposed service tier other than the MVPD's most popular tier of service; and
   (b) distribution on a stand alone, a la carte basis.

3. An MVPD may file a complaint with the FCC if it believes that News Corp has violated this provision. During the pendency of the FCC Complaint, News Corp. shall not deauthorize or cause the removal of an RSN from any MVPD's package of video programming services offered to its subscribers. In any Complaint filed under this provision, News Corp. shall have the burden of establishing that its good faith offer provides a genuine choice to the MVPD without imposing unreasonable conditions on tier carriage.

4. Subject to Sections 1 and 2 supra, nothing herein shall preclude News Corp. and an MVPD from negotiating and entering into a license agreement for carriage of an RSN based upon any mutually agreeable terms.

5. As used in this section the term "most popular service tier" means the most widely subscribed to tier of service offered by an MVPD other than the tier of service containing local broadcast stations and public, educational, and governmental (PEG) access channels.

News Corp. Should Be Precluded from Using DirecTV to Strengthen its Leverage and Pricing Power in Retransmission Consent Negotiations

- News Corp. has used the leverage afforded to it under retransmission consent to put upward pressure on cable rates by forcing operators to pay for and carry News Corp.-affiliated cable channels on their most popular service tier as a condition of retaining access to "must-have" FOX broadcast network programming.

- Retransmission consent negotiations, while often difficult, have occurred against a "balance of terror" backdrop, where both sides lose if impasse is reached. With News Corp. and DirecTV coupled, the terror becomes very one-sided, since DirecTV benefits whenever a cable operator and a programmer reach an impasse over carriage of popular programming.

- No other local broadcast station owner will have the ability to wield such leverage in retransmission consent negotiations. After the merger, a cable operator that fails to comply with News Corp.'s retransmission consent terms and conditions demands could risk providing DirecTV with a *de facto* exclusivity for Fox network and local programming in that operator's market. That will not be sustainable in the long term, and consumers will pay in terms of increased cable prices or reduced competition.

- The added power provided by DirecTV also likely will encourage News Corp. to expand and intensify demands for monetary compensation in retransmission consent negotiations, resulting in higher rates for cable operators' basic tier offerings.

- Several commenters already have suggested proposed conditions aimed at reducing News Corp's post-transaction incentive and ability to use the retransmission consent process to impose higher prices – and each of those proposals merit strong consideration.

- The proposed retransmission consent condition set forth here contain two transaction-specific, structural provisions designed to constrain the added bargaining leverage and pricing power gained by News Corp. via its acquisition of DirecTV.

- *The retransmission consent conditions proposed here are not designed to address the broader, more general concerns about retransmissions consent which have been raised before the Commission and elsewhere, nor are they intended to serve as a response to, or provide a template for responding to, any such broader concerns.*

- The first element of the proposed retransmission consent condition extends News Corp.'s antidiscrimination commitment regarding its cable network to also encompass any broadcast station which it owns and operates, or on whose behalf it negotiates retransmission consent agreements.

- The second element of the proposed condition establishes a "last offer" arbitration mechanism that is designed to reduce News Corp.'s post-transaction incentive to force competing MVPDs to choose between paying higher prices and carrying new Fox channels in order to retain access to existing Fox broadcast content, or ceding that content to their most powerful competitor – DirecTV.

- By serving as a fair and neutral backstop means of resolving retransmission consent disputes, the arbitration mechanism will reduce News Corp.'s post-transaction incentive and ability to threaten or inflict Fox broadcast station service interruptions on subscribers of competing MVPDs as a means of extracting supra-competitive prices and unfair concessions in retransmission consent negotiations.

- The arbitration mechanism would mitigate the incremental incentive created by the transaction of encouraging News Corp. to demand unreasonable and anti-competitive retransmission consent terms and conditions, and thereby preserve the *status quo*, pre-transaction "balance of terror" at the bargaining table.

- The end result of the arbitration backstop mechanism should be to reduce the otherwise likely increase in service interruptions and retransmission consent disputes resulting from the transaction. The mechanism will provide both News Corp. and the MVPDs seeking to carry its broadcast stations a stronger incentive to negotiate reasonably and conclude a mutually agreeable retransmission consent arrangement, rather than face the prospect of having an arbitrator select one party or the other's last offer.

Retransmission Consent Non-Discrimination and Arbitration:

1. News Corp
   (a) will not enter into any exclusive retransmission consent contracts;
   (b) will not grant exclusive rights in whole or in part, to any MVPD with respect to any broadcast station it owns, controls, or receives the rights to negotiate agreements on behalf of ("News Corp. broadcast stations"); and
   (c) will make broadcast television stations available to all MVPDs on non-discriminatory terms.

2. In the event that News Corp. fails to enter into a retransmission consent agreement for any of its broadcast stations with an MVPD by the date on which, under the FCC's rules, the election made pursuant to Section 76.64 becomes effective or, if different, the date of expiration of any current retransmission consent agreement between such MVPD and Newscorp. ("election effective date"), such MVPD shall have the option to resolve the carriage terms of any retransmission consent dispute with News Corp. by package , last offer arbitration.

(a) An MVPD shall provide written notice to News Corp. ten days prior to the election effective date of its intention to initiate the arbitration proceeding authorized in this section 2.

(b) News Corp. shall permit an MVPD initiating an arbitration proceeding authorized by the section 2 to continue to carry any disputed broadcast station(s) during the pendency of such arbitration.

(c) The arbitration shall occur under the commercial arbitration rules of the American Arbitration Association, and the arbitrator shall choose as the arbitration award, either only the last offer proffered by News Corp. or by the non-authorized MVPD for carriage of a News Corp.-owned broadcast station by such MVPD prior to the election effective date. The arbitrator shall make such choice on a package basis, after taking into account each of the items in dispute between the parties.

(d) The arbitrator shall decide on a package basis which final offer is more fair and reasonable considering the combined effects of all elements of the offers and all marketplace circumstances pertaining to carriage of local broadcast stations by MVPDs. In so doing, the arbitrator should consider as relevant, among other things:

   (1) the terms and conditions under which News Corp. broadcast stations are carried by other MVPDs in the local television market or markets at issue, except for any agreement with DirecTV;
   (2) the terms and conditions under which News Corp. broadcast stations are carried by other MVPDs. in other local television markets, except for any agreement with DirecTV;
   (3) the terms and conditions under which other local broadcast stations are carried by the MVPD in the local television market or markets at issue;

(4) the terms and conditions under which other local broadcast stations are carried by the MVPD in other local television markets;
(5) the relative size of the local television market or markets at issue in the arbitration;
(6) the relevant television viewing ratings for the previous three years in the local television market or markets at issue;
(7) the relevant television viewing ratings for the previous three years for the local television stations affected by the retransmission consent agreement submitted pursuant to 2) and 4) above.

Nothing herein shall preclude News Corp. and any MVPD from mutually agreeing to extend an election effective date pending continued negotiations over the terms and conditions of retransmission consent for a News Corp.-owned broadcast station. The MVPD's right to initiate arbitration pursuant to this section shall automatically be extended with such an extension.